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IN THE

SUPREME COURT OF THE UNITED STATES

ARTHUR VANMOOR,

Petitioner

v.

WAL-MART STORES, INC., ET AL.

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITIONER'S REPLY BRIEF

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Arthur Vanmoor files this reply to address certain new points raised in petitioners' brief in opposition.

The "Undisputed Proof" is in Fact Disputed

Respondents falsely state that their proof of prior use of the patented invention is "undisputed." Respondents' Brief, p. 7. This is clearly incorrect. The respondents' claim that no changes were made from prior to the critical date of the patent to the present, lies at the heart of this case and it is indeed disputed. Petitioner's request to be heard in this Court is founded on the lack of such proof in the district court and on the gross error in the appeals court to not review the Respondents' prior art drawings. Instead, the appeals court only relied on the affidavits by two interested persons according to which no changes had been made since prior to the critical date of Petitioner's patent. Had the appeals court reviewed the underlying documentation, of course, the affidavits upon which summary judgment was granted would have been found to be directly at odds with the written documentation. The affidavits must necessarily be false

since, as shown by the specification sheets, Respondents changed their product after the invention was disclosed to them by Petitioner. The content of the affidavits filed by Respondents in the district court is certainly not undisputed. It has been disputed from the outset.

The products made according to the prior art drawings, of course, cannot infringe the patent claims. The current products infringe. If, arguendo, Respondents never changed their specifications, they would not infringe and there would be no need to have Petitioner's patent declared invalid.

Respondents Prove Their Case With Duplicates

Respondents admonish Petitioner for seeking "to have matters both ways," by claiming infringement and at the same time trying to avoid their prior art. *Respondents' Brief*, p. 9. That argument is hollow at best. Petitioner claims that the current products infringe some of the patent claims while the prior art products do not. Where the prior art products did not infringe, they could also not anticipate the claimed invention. It is because Respondents changed their product that Petitioner can have it both ways.

The Questions Presented

Question No. 2 is raised for the first time in this petition because the Court of Appeals for the Federal Circuit, for the first time, founded its decision on the *ready for patenting* test of *Pfaff v. Wells Electronics*, 525 U.S. 55 (1998). The district court only fleetingly referred to *Pfaff* in support of its fundamental definition of the statutory terms "on sale" and "in public use." The district court decision was not founded on the *ready for patenting* test of *Pfaff*. Where an issue is discussed and decided for the first time by the appeals court, such issue is eminently appealable to this Court.

Further, respondents cite to *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5 (1939), and allege that the facts of

that case "are in all material respects the same as those of this case." Respondents' Brief in Opposition, p. 10. The respondents' reliance on *Electric Storage Battery* is strange indeed. That case was decided in 1939, before the Patent Act of 1952, which made very considerable amendments to the section dealing with the public use and on sale doctrines. There, the question was whether and to what extent a patentee could rely on acts in Japan to swear behind a date of first use in this country by the alleged infringer. This is entirely unrelated to the case at hand. Also, the use of the invention by the defendants in *Electric Storage Battery* was "without knowledge of [the patentee's] inventions." *Id.* at 9. Here, of course Sonoco became fully aware of Vanmoor's invention shortly after Vanmoor had filed his priority application, when Vanmoor presented his invention to Sonoco in late 1994.

PETITIONER SHOULD BE GIVEN HIS DAY IN COURT

Summary judgment in the court below was granted on affidavits which were fraudulent and the contents of the Respondents' prior art drawings were not properly appreciated. Petitioner is asking for his day in court so that the trial court may inspect the prior art drawings and compare the same with the infringing, i.e., changed, products. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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